UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MODEST NEEDS FOUNDATION and KEITH P. TAYLOR,

Plaintiffs,

-against-

MARIA BIANCO, JOAN M. CASALI, CESAR SABANDO, ANTHONY S. WETMORE and KATHLEEN BARKER,

Defendants.

16 Civ. 3144 (HBP)

OPINION AND ORDER

PITMAN, United States Magistrate Judge:

I. Introduction

Plaintiffs Modest Needs Foundation ("MNF") and Keith P. Taylor commenced this action against defendants Maria Bianco, Joan M. Casali, Cesar Sabando, Anthony S. Wetmore and Kathleen Barker[1] pursuant to Bivens v. Six Unknown Named Agents of Federal

[1]The complaint does not specify in what capacity defendants are being sued.

> A suit against federal officials acting in their official capacities is essentially a suit against the United States, and is thus barred by sovereign immunity. Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d Cir. 1994). However, sovereign immunity will not shield federal officials from judicial scrutiny where they committed constitutional torts in their individual capacities. Bivens v. Six Unknown

(continued...)

Bureau of Narcotics, supra, 403 U.S. 388, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, alleging violations of their right to Due Process[2] and Equal Protection under the Fifth and Fourteenth Amendments of the United States Constitution. Plaintiffs' claims arise out of a series of examinations of MNF by the Internal Revenue Service (the "IRS") over a period of more than five years. Plaintiffs seek compensatory and punitive damages, as well as declaratory relief. By notice of motion dated October 28, 2016 (D.I. 31), defendants move to dismiss plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(6).

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[1](...continued)
Named Agents [of Fed. Bureau of Narcotics], 403 U.S. 388, 397, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971). Thus, claims against federal employees acting in their official capacities will be dismissed outright, but claims against federal officials acting in their individual capacities will be evaluated on the merits. See Robinson, 21 F.3d at 510.

Zherka v. Ryan, 52 F. Supp. 3d 571, 578 (S.D.N.Y. 2014) (Griesa, D.J.). For the purposes of this motion, I shall assume that the defendants are being sued in their individual capacities.

[2]It is not clear from the complaint whether plaintiffs are alleging violations of substantive due process, procedural due process or both. In their memorandum of law in opposition to the motion to dismiss, plaintiffs argue that the complaint alleges both (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss, dated Dec. 2, 2016 (Docket Item ("D.I.") 34) ("Pl.'s Mem."), at 6-15). For the purposes of this motion, I shall assume that the complaint alleges both substantive and procedural due process violations.

The parties have consented to my exercising plenary jurisdiction over this matter pursuant to 28 U.S.C. § 636(c). For the reasons set forth below, defendants' motion to dismiss is granted.

II. Facts

A. Background

The complaint alleges the following facts which I assume to be true for the purposes of resolving this motion. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).[3]

In March 2002, Taylor formed MNF, a non-profit, tax-exempt organization, the stated mission of which is to assist "hard-working, low-income individuals and families struggling to overcome the burden of short-term, emergency expenses" (Complaint, dated Apr. 25, 2016 (D.I. 1) ("Compl.") ¶¶ 21, 26). After garnering national media attention, MNF's revenue exceeded $500,000 for the first time in fiscal year ("FY") 2005; as a result, MNF was required to undergo an external audit (Compl. ¶¶

[3]The complaint is not well drafted, lacks continuity and contains some allegations which appear to be counterintuitive. To the extent my statement of the facts contains similar flaws, it is because the flaws exist in the complaint. I have attempted to state the facts as coherently as possible without substantively altering plaintiffs' allegations.

23-28, 35). MNF hired Iris Rosken to perform this audit, as well as the audits in FY 2006 and FY 2007 (Compl. ¶¶ 35-37, 39, 43). Beginning in FY 2008, MNF hired Eisner LLP ("Eisner"), an accounting firm that Rosken supervised, to conduct annual audits (Compl. ¶ 49). From FY 2005 to FY 2008, the audits found no irregularities with MNF's bookkeeping, accounting practices, corporate policies or its leadership (Compl. ¶¶ 37, 39, 43, 49).

In FY 2009, Eisner performed an audit of MNF and once again found no irregularities with respect to MNF's accounting policies and practices, management or recordkeeping (Compl. ¶ 60). However, the audit noted an outstanding "loan" to Taylor; it accounted for more than fifty percent of the organization's business expenses incurred in FY 2009 that Taylor had elected to reimburse pursuant to a longstanding agreement[4] with MNF's Board of Directors (Compl. ¶ 61). In a meeting, Eisner explained that because Taylor failed to deliver the reimbursement prior to the close of business on December 31, 2009, Eisner had no choice but to carry over the balance into FY 2010 and to show the outstanding amount as a loan to Taylor in FY 2009 (Compl. ¶ 61). Despite Taylor's insistence that he had delivered the reimbursement

[4]Pursuant to this agreement, any expense incurred by MNF at Taylor's discretion that was determined by Taylor and a board member to be "'ineffective'" would be reimbursed by Taylor (Compl. ¶ 32).

before the end of 2009, MNF's Board of Directors voted to accept the audit report (Compl. ¶ 62).

After the meeting, Taylor asked Rosken why the audit report would show an outstanding loan to Taylor even though Taylor had delivered the funds prior to the close of business on December 31, 2009 (Compl. ¶ 62). Rosken explained that Eisner noted that Taylor's reimbursement was not deposited until mid-January 2010; under those circumstances, Eisner determined that the payment was properly classified as having been received in FY 2010, not FY 2009 (Compl. ¶¶ 62-63).

Over the ensuing months, Rosken became increasingly hostile and had had several disagreements with Taylor (Compl. ¶¶ 64-68). In October 2010, Taylor discovered that Rosken had systematically allocated hundreds of MNF's expenses to an account which tracked the business expenses that Taylor would likely choose to re-pay at the conclusion of the fiscal year (Compl. ¶ 69). These adjustments suggested that Taylor owed MNF a great deal of money (Compl. ¶ 70).

Taylor decided to review all of MNF's FY 2009 and FY 2010 books and records, particularly all records pertaining to the transaction that had resulted in the booking of the "outstanding loan" in FY 2009 (Compl. ¶ 70). In conducting this review, Taylor discovered that Rosken had accessed MNF's books

and records in January 2010 and administratively changed the "date received" entry for Taylor's reimbursement check from a date in 2009 to one in 2010 (Compl. ¶ 70). Taylor met with Eisner to discuss this issue and presented documentation regarding the transaction in question (Compl. ¶ 72). Upon reviewing Taylor's evidence, Eisner told him that the repayment should have been classified as occurring in FY 2009 and that no outstanding loan should have been booked (Compl. ¶ 73). Eisner also produced work papers to Taylor which showed that Rosken had adjusted the "date received" field prior to Eisner's audit (Compl. ¶ 73). Eisner went on to explain that no provision of generally accepted accounting principles could have justified Rosken's adjustment and that Rosken knew, or reasonably ought to have known, that the adjustment would raise very significant issues with state and federal regulatory agencies and dramatically increase the probability that MNF would be selected for an audit by the IRS (Compl. ¶ 73). After learning this information from Eisner, Taylor fired Rosken (Compl. ¶¶ 76-78).

Immediately after her termination, Rosken sent a letter to MNF's Board of Directors accusing Taylor of having founded MNF primarily to benefit himself and his family and of treating MNF as his "'personal piggy bank'" (Compl. ¶ 79). Rosken insisted that the Board of Directors was obligated to hire a forensic

accountant to determine the extent of Taylor's alleged malfeasance, to terminate Taylor's employment as President and Executive Director of MNF and to hire her into Taylor's position; Rosken also demanded that the Board make and inform her of its decision regarding Taylor's employment within 14 days (Compl. ¶ 79). Rosken's letter went on to state that if the Board of Directors did not take the foregoing actions and report back to her within 14 days, she would take "'whatever actions were necessary'" to ensure that MNF and Taylor were held accountable for Taylor's alleged abuse of his position (Compl. ¶ 79). The Board of Directors determined that Rosken's allegations were baseless and sent a note to Rosken indicating that their investigation had been completed and that they had "'taken the action they deemed appropriate'" (Compl. ¶ 83).

B. Examination of MNF's FY 2008 by Barker and Sabando

Approximately two weeks after the Board of Directors informed Rosken that their investigation was complete, Kathleen Barker, a Revenue Agent working in the IRS's tax-exempt/government entities group, sent MNF a "certified letter" indicating that the organization's FY 2008 Form 990 had been

selected for an audit (Compl. ¶ 84).[5] When Taylor and Barker met on or about January 3, 2011, Barker explained that the audit was the result of a "'referral' (e.g., a 'complaint' of some kind)" (Compl. ¶ 85). She also explained that the purpose of the audit was to determine whether MNF qualified for tax exempt status (Compl. ¶ 85). Finally, Barker explained that the audit would take "years" to complete, even though she had not even begun to review any books or records (Compl. ¶ 86). Taylor gave Barker access to all of MNF's books and records (Compl. ¶ 87).

In late March or early April 2011, Taylor received an Information Document Request ("IDR"), signed by Barker and authorized by Cesar Sabando, Barker's direct supervisor, which requested a minimum of one thousand pages of documentation regarding MNF's FY 2008 financial transactions (Compl. ¶ 91). This request sought documents for virtually every expense incurred by MNF in that year (Compl. ¶ 91). Plaintiffs claim that the IDR requested far more documentation from MNF than was reasonably necessary to account for the "business purpose" of MNF's FY 2008 expenditures and/or to determine whether MNF served a bona fide charitable purpose (Compl. ¶ 94).

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[5]The complaint does not explain what plaintiffs mean by a "certified letter."

Taylor received a second IDR from Barker on or about August 16, 2011 (Compl. ¶ 97). This IDR focused almost exclusively on travel and meeting expenses incurred by MNF in FY 2008 (Compl. ¶ 98). In light of Barker's ongoing examination, the second IDR seemed to suggest that Barker was seeking evidence to support the allegations of self-dealing that Rosken had leveled against Taylor (Compl. ¶ 98). Specifically, it appeared that Barker and Sabando were attempting to establish that Taylor founded MNF for his personal benefit, treated the organization as his "'personal piggy bank'" and was not fit to serve as MNF's President and Executive Director (Compl. ¶¶ 102, 104). As a result of their belief that they were being targeted, MNF and Taylor retained counsel in November 2011 (Compl. ¶¶ 105-06).

On January 3, 2012, Barker demanded that either Taylor or his counsel agree to extend by one year the statutory deadline for the assessment of taxes or penalties (Compl. ¶ 111). On January 11, 2012, Barker stated that she needed an additional year to examine MNF's books and records and that if Taylor did not agree to extend the deadline, Barker would close the audit, issue a Notice of Deficiency (an "NOD") against Taylor and commence an examination of MNF's books and records for additional

years (Compl. ¶ 113).[6] Barker explained that these actions would be easy for her to justify because, notwithstanding her need for an additional year to complete the examination, she had already determined that flights Taylor had taken[7] were a fringe benefit, whether or not they were for business purposes, and the "Conference and Meeting" expenses incurred were inappropriate (Compl. ¶ 113). Taylor agreed to a three-month extension of the deadline (Compl. ¶ 115).

C. Examination of MNF's FY 2008 by Bianco and Sabando

Maria Bianco replaced Barker in February 2012 and was assigned to complete the examination of MNF's FY 2008 books and records (Compl. ¶ 117). In April 2012, Bianco informed Taylor and his counsel that she identified only one issue with respect to MNF's books and records, which was that MNF had issued both a Form W-2 and a Form 1099 to three employees, one of whom was Taylor (Compl. ¶¶ 122, 124).[8] On a telephone call, plaintiffs'

[6]It seems counterintuitive that Barker would seek to expand the audit when she did not even finish her audit of FY 2008.

[7]For example, Taylor traveled to San Francisco because MNF was opening an office there (Compl. ¶¶ 46, 88).

[8]The complaint actually alleges that these employees were "paid via both a Form W2 and a Form 1099" (Compl. ¶ 122 (emphasis in original)). Because neither a W-2 nor a 1099 is a payment (continued...)

counsel informed Bianco that MNF would remit payment to correct the delinquency (Compl. ¶ 125). However, Sabando joined the call and informed counsel that he still would not issue a "closing letter" with respect to the FY 2008 examination, even though no other deficiencies were identified, because the audit was "ongoing" (Compl. ¶ 126). Sabando explained that the examination would be ongoing because he personally did not like Taylor (Compl. ¶ 126). Sabando also expressed his belief that Taylor used MNF as his "personal 'bank account'" and that if MNF's Board of Directors cared about MNF, they would fire Taylor (Compl. ¶ 126). Finally, Sabando opined that if Taylor cared about MNF, he would resign because Sabando intended to keep MNF under audit until either Taylor was removed or resigned from his position or the cost of responding to the audits forced MNF out of business (Compl. ¶ 126). Upon learning of these statements, Taylor informed his counsel that the statements closely resembled the accusations Rosken had made against MNF and Taylor at the time of her termination (Compl. ¶ 126).

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[6](...continued)
instrument, I take this to mean that the employees were issued both a Form W-2 and a Form 1099 for their wages.

In May 2012, Taylor received assessments for the deficiency Bianco identified, and MNF remitted payment in the interest of closing the FY 2008 audit (Compl. ¶ 127).

D. Expansion of Examination by Bianco and Sabando

On the same day that MNF remitted payment in an effort to close the FY 2008 audit, Taylor received a new IDR from Bianco (Compl. ¶ 128). This IDR indicated that, despite having found no additional issues with respect to MNF's FY 2008 books and records, the audit was being expanded at Sabando's discretion to include MNF's Form 990 for FY 2009 and FY 2010 (Compl. ¶ 128). The IDR also allegedly sought documents that did not exist (Compl. ¶ 129). For example, although the IDR requested board minutes regarding a list of expenses that were incurred by Taylor and that the Board of Directors determined were "'unnecessary and unreasonable,'" Barker, Bianco and Sabando knew that no such expenses existed (Compl. ¶ 129).[9] When plaintiffs' counsel called Sabando to ask why the examination was expanded when the FY 2008 examination had not revealed any wrongdoing beyond the

[9]MNF's Board of Directors did not disallow these expenses; rather, Taylor had determined that these expenses were not properly chargeable to MNF and voluntarily reimbursed the organization for the expenses (Compl. ¶ 129).

manner in which the wages of three employees were reported to the IRS, Sabando explained that the audit was being expanded because MNF was unwilling to extend the statutory deadline to assess taxes or penalties for FY 2008 for the full year, so Sabando's office could not "'complete their audit of that year'" (Compl. ¶¶ 130-31).[10]

1. The Freedom of Information Act Request

On June 10, 2012, plaintiffs' counsel drafted a Freedom of Information Act request to the IRS, requesting a copy of the audit file concerning MNF (Compl. ¶ 135). On approximately December 21, 2012, counsel received a redacted copy of the file (Compl. ¶ 137). It revealed that prior to Barker's initial meeting with Taylor in January 2011, Barker and Sabando had already determined that Taylor used MNF's resources for his personal benefit and that he should be removed as MNF's President (Compl. ¶ 137). Moreover, the file revealed that Bianco and Sabando intended to continue their examination of MNF for as long

[10]Again, it seems counterintuitive to expand the audit to FY 2009 and FY 2010 when Sabando did not even finish his audit of FY 2008. The complaint later alleges that Sabando expanded the audit because he did not personally like Taylor and because he wanted both to force Taylor from his position and to force MNF into insolvency (Compl. ¶ 252).

as was necessary to force Taylor's resignation or termination, or until such time as the cost of responding to the examination forced MNF into insolvency (Compl. ¶ 137).

2. Attempts to Extend the Statutory Deadline

On March 21, 2013, Taylor and his counsel received summonses demanding that they deliver the documentation requested in the 2012 IDR by April 1, 2013 (Compl. ¶ 138). When counsel asked for an extension of the deadline to comply with the summons, Sabando stated that he would consider extending the deadline only if MNF agreed to extend the statutory deadline for the assessment of taxes and penalties for FY 2009 for a minimum of six months (Compl. ¶ 140). When counsel explained that such an extension was unnecessary, Sabando ended the conversation and subsequently failed to return counsel's telephone calls (Compl. ¶¶ 140, 143).

On May 3, 2013, Sabando informed counsel that if MNF did not agree to extend the deadline for a full six months, he would immediately move for revocation of MNF's tax-exempt status (Compl. ¶ 144). On May 6, counsel informed Sabando that MNF and Taylor would agree to a three-month extension, but Sabando refused the offer (Compl. ¶ 146). On May 8, Sabando informed

counsel that because Taylor was unwilling to extend the statutory deadline as Sabando had demanded, Bianco and Sabando would be issuing a Jeopardy Assessment not against MNF, but against Taylor personally (Compl. ¶ 149). Alternatively, Sabando stated that if Taylor or his counsel agreed to extend the deadline by six months, Taylor could avoid the assessment or appeal it (Compl. ¶ 150). Counsel reiterated the offer to extend the deadline by three months, at which point Sabando ended the conversation (Compl. ¶ 150).

3. Jeopardy Assessment and NOD for FY 2009

On May 15, 2013, Taylor received a Jeopardy Assessment and NOD, even though he was never personally under audit and never had the opportunity to provide documentation with respect to the accuracy of his own Form 1040 for FY 2009[11] (Compl. ¶ 151). The NOD did not contain an itemized list of all expenses that had been disallowed or an explanation of the disallowances, as was required; rather, the NOD consisted of a list of disal-

[11]While personal taxes are normally filed by calendar year, an individual may "adopt a fiscal year provided that the individual maintains his or her books and records on the basis of the adopted fiscal year." I.R.S. Publ'n 538, 2008 WL 713620 at *2, *5 (Mar. 1, 2008).

lowed lump-sum payments that were broadly categorized (Compl. ¶¶ 153-54).

After receiving the NOD, Taylor and his counsel pursued several remedies. They filed a motion challenging the NOD in the United States Tax Court (the "Tax Court") (Compl. ¶ 159). They also successfully petitioned Senator Kirsten Gillibrand to commence an investigation of the ongoing examination (Compl. ¶¶ 162-63). As a result of Senator Gillibrand's investigation, Sabando was disciplined, placed on administrative leave and temporarily relieved of his managerial duties (Compl. ¶ 163). Additionally, the examination of MNF was transferred to a different group, headed by IRS Revenue Manager Joseph Colletti (Compl. ¶ 163).[12]

E. FY 2009 "Re-Audit"

On September 16, 2013, Colletti informed plaintiffs' counsel that MNF's FY 2009 books and records would be re-audited and that the re-audit would be headed by Bianco (Compl. ¶ 165).

[12]Taylor and his counsel also sought help from the Office of the Taxpayer Advocate and the United States Treasury Inspector General for Tax Administration (Compl. ¶¶ 159-60). However, both offices informed Taylor and his counsel that they could not help (Compl. ¶¶ 159-60).

On November 5, 2013, an IRS Appeals Officer called plaintiffs' counsel to discuss the possibility of MNF's FY 2009 books and records being reviewed by the IRS Appeals Office ("Appeals"), an option which plaintiffs claim should have been available to them (Compl. ¶ 167). The next day, plaintiffs' counsel spoke by telephone with Joan M. Casali, the IRS Counsel who had been assigned to defend the NOD (Compl. ¶¶ 167-68). Casali was adamant that no one in Appeals would be allowed to review either the NOD or the documentation MNF compiled in response to the IDR for MNF's FY 2009 books and records (Compl. ¶ 168). Rather, Casali informed counsel, she would accept the re-audit as if it had been completed by Appeals (Compl. ¶ 168).[13]

The re-audit of MNF's FY 2009 books and records was scheduled to begin on February 10, 2014, with Bianco, Casali and plaintiffs' counsel present (Compl. ¶ 175). At the commencement of the gathering, Casali announced that she was attending the re-audit not in her capacity as IRS Counsel, but rather on behalf of Appeals, and that she had been empowered by Appeals to perform

[13]Months later, an IRS Appeals Officer informed plaintiffs' counsel that there was an "obscure element" of the Internal Revenue Manual that allowed Casali to force a case into Tax Court for any reason she believed was appropriate and without providing an explanation (Compl. ¶ 183).

the functions of an Appeals Officer[14] (Compl. ¶ 175). However, after calling Appeals, Taylor's counsel learned that Casali's statements were false (Compl. ¶ 175). Casali then prevented the re-audit from proceeding and stated that she had already determined that Taylor used MNF as his "personal 'expense account'" and demanded that plaintiffs' counsel justify certain decisions by the Board of Directors (Compl. ¶ 176). She also insisted that the re-audit focus solely on the expenses that had been charged to Taylor by Bianco and Sabando in the FY 2009 NOD (Compl. ¶ 177). Finally, Casali stated that the next decision in the case would be hers, not Appeals', and no re-audit occurred at that time (Compl. ¶¶ 177-78).

On February 20, 2014, Bianco sent plaintiffs' counsel an itemized list of expenses that had been disallowed on the NOD previously issued to Taylor (Compl. ¶ 179). Bianco and Sabando had construed virtually all of the business expenses incurred by MNF in FY 2009 as if they had been salary paid to Taylor by MNF in FY 2009 (Compl. ¶¶ 179-80). The list also included amounts that Bianco knew, or reasonably should have known, had been reimbursed by Taylor (Compl. ¶ 179).

[14]The complaint does not specify what the functions of an Appeals Officer are.

A second re-audit was scheduled to take place on February 26, 2014 (Compl. ¶ 181). Casali attended the re-audit and used the meeting to review documentation which, under normal circumstances, should not have been available to her and to ask questions that were apparently aimed at defending the IRS's position in the matter (Compl. ¶ 181). Plaintiffs claim that these actions were an impermissible form of pre-trial discovery in the Tax Court proceeding that Taylor had commenced (Compl. ¶ 182). She also reiterated that she had already concluded that Taylor used MNF to fund his own expenses (Compl. ¶ 181). Once again, no re-audit took place (Compl. ¶ 181).

On March 26, 2014, an IRS Appeals Officer informed plaintiffs' counsel that Casali had taken the case with respect to MNF's FY 2009 books and records from Appeals in order to prepare for the trial in Tax Court and that Casali would not allow Appeals to review any of the computations made by Bianco and Sabando during their audit for possible settlement purposes (Compl. ¶ 183).

On or about June 23, 2014, Casali wrote to plaintiffs' counsel stating that she would void Bianco's ultimate findings with respect to MNF's FY 2009 books and records and would personally re-audit them, even though Bianco and Colletti had previously told plaintiffs' counsel that substantially all questions

with respect to the FY 2009 examination and resulting NOD had been answered satisfactorily (Compl. ¶¶ 187-88, 194).

Around June 27, 2014, several individuals who are not specifically identified in the complaint told Taylor that they had been served with subpoenas issued by Casali, ordering them to appear at the Tax Court proceeding Taylor had commenced with respect to the NOD (Compl. ¶ 196). The subpoenas did not refer to MNF and were written in a manner that suggested Taylor was the defendant in the matter (Compl. ¶ 196). Casali withdrew the subpoenas after a judge in the Tax Court admonished her for improperly issuing them (Compl. ¶¶ 202-03).

F. Jeopardy Assessment and NOD for FY 2010

In May 2014, Anthony S. Wetmore replaced Bianco as MNF's examiner (Compl. ¶ 190). In order to complete his examination of MNF's FY 2010 books and records, he prepared a new IDR in June 2014 requesting voluminous information within 19 days, a shorter time frame than the 30-day statutory period normally allotted (Compl. ¶ 192).

On October 20, 2014, Wetmore informed plaintiffs' counsel that, at Casali's direction, he would be ceasing his examination into FY 2010, closing the case and issuing a second

NOD against Taylor (Compl. ¶ 210). "Per Casali,"[15] Wetmore told counsel that this NOD would treat all travel, meeting, credit card payments and similar business expenses incurred by MNF in FY 2010 as if they were salary paid to Taylor (Compl. ¶ 210). Wetmore hinted that he would be willing to reconsider his decision if plaintiffs agreed to extend the statutory deadline for the assessment of taxes and penalties (Compl. ¶ 210). After plaintiffs' counsel advised Wetmore that plaintiffs would not agree to an extension, the NOD was issued against Taylor (Compl. ¶¶ 211-12). Like the other NOD, this NOD treated business expenses incurred by MNF as if they had been salary paid to Taylor (Compl. ¶ 212). Additionally, this NOD did not itemize the expenses incurred by MNF that had been disallowed (Compl. ¶ 212). Finally, the inclusion of a certain sum[16] on the NOD clearly indicated that it was really Taylor who had been audited by Wetmore and Casali, not MNF, despite the fact that Taylor had never been notified that he was under examination, had never been asked to provide any records concerning his Form 1040 for FY 2010 and had never been advised of his rights (Compl. ¶ 213).

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[15]I understand the complaint's use of this expression to mean that Wetmore acted at Casali's direction.

[16]This sum, which was also listed on Taylor's Form 1099-T, was interest purportedly received by Taylor as part of a rental agreement (Compl. ¶ 213).

G. FY 2011 Examination by Wetmore

On or about November 25, 2013, plaintiffs and their counsel received notice that MNF's FY 2011 Form 990 had been selected for an audit, and Wetmore commenced the examination in December 2014 (Compl. ¶¶ 170, 214). In January 2015, Wetmore, in collaboration with Casali, issued five IDRs for FY 2011 requesting voluminous information from MNF, even though Wetmore either had, or should have already had, the information (Compl. ¶¶ 214-19).

Wetmore engaged in numerous allegedly inappropriate activities in connection with this audit. For example, he demanded that Taylor provide his personal Form 1040 for FY 2011 and that Taylor consent to an extension of the deadline for the assessment of taxes and penalties in connection with that Form 1040, even though Taylor was not personally under audit (Compl. ¶ 218). Additionally, at the express direction of Casali and in an attempt to circumvent discovery, Wetmore telephoned one of MNF's directors and demanded that she submit to an interview (Compl. ¶¶ 222-23).

On September 2, 2015, Wetmore issued an NOD against Taylor for FY 2011, even though Taylor had never been placed

under audit and even though a bona fide examination of MNF's FY 2011 books and records had allegedly not been completed (Compl. ¶ 229). Like the other NODs in issue, this NOD did not itemize the business expenses that had been disallowed; rather, it included lump sums that were broadly categorized (Compl. ¶ 230). The NOD contained one figure that was not referenced in any part of MNF's books and records, but instead came from Taylor's Form 1099-T for FY 2011, suggesting that Taylor himself was the target of an audit (Compl. ¶¶ 230-31).

Plaintiffs' counsel petitioned the Tax Court to protest the NOD and contacted Appeals in an effort to reach a settlement (Compl. ¶ 232). On December 7, 2015, plaintiffs' counsel received notification that Wetmore had refused to forward the files related to the FY 2011 examination to Appeals for review (Compl. ¶ 234). The file was instead delivered to Casali in preparation for trial (Compl. ¶ 234).

H. Proposal to Revoke MNF's Tax-Exempt Status

On December 8, 2015, Wetmore, working under the direct supervision of Casali, authored and filed a proposal that MNF's tax-exempt status be revoked (Compl. ¶ 236).

Plaintiffs and their counsel were inadvertently provided with an unredacted copy of the proposal on or about December 11, 2015 (Compl. ¶ 237). The proposal demonstrated that from at least 2009, when Sabando had threatened to ruin Taylor professionally and financially if he did not immediately resign, it was Taylor, not MNF, who had been the target of the examinations (Compl. ¶ 238). Defendants had completed examinations of Taylor personally, without authorization and without ever placing him under formal examination (Compl. ¶ 238). Defendants also failed to request documentation from Taylor personally, issued unwarranted NODs against him and deprived Taylor of access to the Appeals process (Compl. ¶ 238). The proposal also showed that defendants had disregarded all of the information MNF presented, particularly that information which would have been advantageous to the organization, in the interest of prolonging the examinations of MNF in an effort to render it insolvent (Compl. ¶ 238). Finally, the proposal contained a series of overt omissions and misstatements (Compl. ¶¶ 238-53). For example, Wetmore failed to mention that Sabando had expanded MNF's audit to include FY 2009 and FY 2010 because he did not personally like Taylor and because he wanted both to force Taylor from his position and to force MNF into insolvency (Compl. ¶ 252). Wetmore also wrote that MNF made indirect payments to Taylor through an entity named 501web, a

company that MNF paid to rebuild its website (Compl. ¶¶ 55-59, 121, 241). Wetmore allegedly made this allegation despite possessing documentation that Taylor did not own or control 501web (Compl. ¶¶ 208, 242).

On or about January 15, 2016, plaintiffs' counsel sent a document protesting the proposal to revoke MNF's tax-exempt status (Compl. ¶ 255).[17] On January 20, 2016, after receiving correspondence from Wetmore indicating that he and Casali would not accept the protest, counsel called Wetmore to inform him that he was protesting the proposal to Appeals, not to Wetmore and Casali (Compl. ¶ 256). Wetmore informed counsel that he had been instructed to answer the protest as if he worked in Appeals (Compl. ¶ 256).

I. Consequences to Plaintiffs

Defendants' alleged actions led to serious adverse consequences for plaintiffs. Defendants' actions allegedly drove MNF to the verge of insolvency (Compl. ¶ 227). Its income and grant-making capacity was substantially reduced, and it has had to spend significant sums to respond to the IDRs (Compl. ¶¶ 274,

[17]The complaint does not state to whom plaintiffs' counsel delivered the document.

281). Additionally, Taylor's credit was ruined, and he was also driven to the verge of bankruptcy (Compl. ¶ 298).

III. Analysis

A. Plaintiffs' Claims and Defendants' Arguments

Plaintiffs allege that defendants deprived MNF of its Fifth and Fourteenth Amendment right to Due Process and Equal Protection by subjecting it to a series of examinations over five years in order to force it into insolvency and to remove Taylor from his position (Compl. ¶¶ 2, 4, 264-83). Taylor alleges that defendants deprived him of his Fifth and Fourteenth Amendment right to Due Process and Equal Protection by issuing a series of assessments against Taylor personally for taxes, interest and penalties, even though Taylor was never placed under audit, notified that he was under audit or asked to provide documentation regarding any alleged taxes he may have owed (Compl. ¶¶ 3, 284-304). Taylor also alleges that defendants deprived him of his constitutional rights by denying him the opportunity to utilize the Appeals process and instead forcing him to litigate in Tax Court, which would have been prohibitively expensive (Compl. ¶¶ 292-94). Plaintiffs seek more than $9 million in compensatory and punitive damages, as well as a declaratory

judgment that defendants violated their Fifth and Fourteenth Amendment rights to Due Process and Equal Protection (Compl., at 146-47).

Defendants seek dismissal of the complaint. First, they argue that the complaint fails to state a Fourteenth Amendment claim because the defendants are federal -- not state -- actors (Memorandum of Law in Support of Motion to Dismiss the Complaint, dated Oct. 28, 2016 (D.I. 32) ("Def.'s Mem."), at 18). Second, they argue that Congress has provided a comprehensive remedial scheme for plaintiffs' claims and, therefore, a Bivens remedy should not be implied for the conduct in issue (Def.'s Mem., at 7-12). Third, defendants argue that the complaint fails to state either a Due Process or Equal Protection claim under the Fifth Amendment (Def.'s Mem., at 14-18). Fourth, defendants argue that they are entitled to qualified immunity (Def.'s Mem., at 12-14).

B. Legal Standards

1. Standards Applicable to Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6)

The standards applicable to a motion to dismiss pursuant to Rule 12(b)(6) are well-settled and require only brief review.

> The Supreme Court has established a two-step process for determining whether a plaintiff has pled sufficient facts to overcome a motion to dismiss. A court must first ignore "mere conclusory statements" or legal conclusions, which are not entitled to the presumption of truth. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007)). Then, assuming the veracity of the remaining facts, "a complaint must contain sufficient factual matter . . . to 'state a claim [for] relief that is plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 570, 127 S. Ct. 1955). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (emphasis added). While this plausibility standard is not "akin to a 'probability requirement,'" it "asks for more than a sheer possibility that a defendant has acted unlawfully." Id. (quoting Twombly, 550 U.S. at 556, 127 S. Ct. 1955). Pleading facts that are "'merely consistent with' a defendant's liability" is insufficient. Id. (quoting Twombly, 550 U.S. at 557, 127 S. Ct. 1955).

Pungitore v. Barbera, 506 F. App'x 40, 42 (2d Cir. 2012) (summary order) (alterations and emphasis in original).

2. Fifth and Fourteenth Amendments

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law," U.S. Const. amend. V, and is applicable only to the federal government. Windsor v. United States, 699 F.3d 169, 193 (2d Cir. 2012), aff'd, 133 S. Ct. 2675 (2013); Viteritti v. Incorporated Village of Bayville, 831 F. Supp. 2d 583, 592 (E.D.N.Y. 2011). Although the Fifth Amendment does not contain an explicit Equal Protection Clause, "the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." Washington v. Davis, 426 U.S. 229, 239 (1976), citing Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954); see Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

Conversely, the Fourteenth Amendment applies only to the states, not the federal government. District of Columbia v. Carter, 409 U.S. 418, 424 (1973) ("[A]ctions of the Federal Government and its officers are beyond the purview of the [Fourteenth] Amendment."); Hudson Valley Black Press v. Internal Revenue Serv., 307 F. Supp. 2d 543, 545 n.4 (S.D.N.Y. 2004) (Conner, D.J.), aff'd, 409 F.3d 106 (2d Cir. 2005). The Four-

teenth Amendment contains both a Due Process Clause and an Equal Protection Clause, providing, respectively, that no state shall "deprive any person of life, liberty, or property, without due process of law" or "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

3. Bivens Action

In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra, 403 U.S. 388, "the Supreme Court recognized as implicit in certain constitutionally protected rights a federal claim for money damages against federal officials, sued in their individual capacities, for violations of those rights." M.E.S., Inc. v. Snell, 712 F.3d 666, 671 (2d Cir. 2013). A Bivens claim provides "a judicially-created remedy stemming directly from the Constitution itself." Arar v. Ashcroft, 585 F.3d 559, 571 (2d Cir. 2009) (en banc), citing Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra, 403 U.S. at 397. Only money damages are available in a Bivens action. Higazy v. Templeton, 505 F.3d 161, 169 (2d Cir. 2007).

A Bivens remedy is an "extraordinary thing that should rarely if ever be applied in 'new contexts.'" Arar v. Ashcroft, supra, 585 F.3d at 571; Dotson v. Griesa, 398 F.3d 156, 166 (2d Cir. 2005) ("Because a Bivens action is a judicially created

remedy, however, courts proceed cautiously in extending such implied relief[.]"). Just this year, the Supreme Court has emphasized that "expanding the Bivens remedy is now a disfavored judicial activity." Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) (internal quotation marks omitted). The Supreme Court has recognized a Bivens action in only three contexts: (1) an unreasonable search and seizure in violation of the Fourth Amendment, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, supra, 403 U.S. at 397; (2) employment discrimination in violation of the Due Process Clause of the Fifth Amendment, Davis v. Passman, 442 U.S. 228, 248-49 (1979), and (3) failure to treat an inmate's medical condition in violation of the Eighth Amendment, Carlson v. Green, 446 U.S. 14, 19 (1980). Ziglar v. Abbasi, supra, 137 S. Ct. at 1854-55, 1857 (collecting cases where the Supreme Court refused to extend Bivens); see Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001) (since Carlson, the Supreme Court has "consistently refused to extend Bivens liability to any new context or category of defendants"). The Supreme Court has noted that "the analysis in the Court's three Bivens cases might have been different if they were decided today" and that the Bivens remedy should be retained in the "common and recurrent sphere" of the "search-and-seizure context

in which it arose." Ziglar v. Abbasi, supra, 137 S. Ct. at 1856-57.

In determining whether a Bivens action should proceed, the court must first analyze whether the claim at issue extends Bivens in a "new context." Arar v. Ashcroft, supra, 585 F.3d at 563. As the Supreme Court explained in Ziglar v. Abbasi, supra, 137 S. Ct. at 1859-60, 1865,

> The proper test for determining whether a case presents a new Bivens context is as follows. If the case is different in a meaningful way from previous Bivens cases decided by this Court, then the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous Bivens cases did not consider . . . . [T]he new-context inquiry is easily satisfied.

If the plaintiff's claim presents a "new context," the court must then engage in a two-step inquiry. First, "there is the question whether any alternative, existing process for protecting the [constitutionally-recognized] interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." Wilkie v. Robbins, 551 U.S. 537, 550 (2007), citing Bush v. Lucas, 462 U.S. 367, 378 (1983);

accord Ziglar v. Abbasi, supra, 137 S. Ct. at 1858. Second, "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed . . . to any special factors counselling hesitation before authorizing a new kind of federal litigation." Wilkie v. Robbins, supra, 551 U.S. at 550 (internal quotation marks omitted); accord Ziglar v. Abbasi, supra, 137 S. Ct. at 1857. The "special factors" inquiry

> must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed . . . . [I]f there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy . . ., the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III.

Ziglar v. Abbasi, supra, 137 S. Ct. at 1857-58; see Hudson Valley Black Press v. Internal Revenue Serv., supra, 409 F.3d at 110 ("'[T]he concept of "special factors counselling hesitation in the absence of affirmative action by Congress" has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent . . . .'"), quoting Schweiker v. Chilicky, 487 U.S. 412, 423 (1988). Rather than providing "such remedies as are necessary," the inquiry is now limited to determining Congress' intent in authorizing a damages remedy for the particular constitutional interest at

issue. Ziglar v. Abbasi, supra, 137 S. Ct. at 1855-57 (internal quotation marks omitted).

One special factor counseling hesitation is "the comprehensiveness of available statutory schemes" to address the conduct at issue. Arar v. Ashcroft, supra, 585 F.3d at 573, citing Dotson v. Griesa, supra, 398 F.3d at 166. "[T]he Supreme Court has stated that if the conduct at issue already is 'governed by comprehensive procedural and substantive provisions [of law] giving meaningful remedies against the United States,' then it is 'inappropriate' for courts 'to supplement that regulatory scheme with a new judicial remedy.'" M.E.S., Inc. v. Snell, supra, 712 F.3d at 671-72 (second alteration in original), quoting Bush v. Lucas, supra, 462 U.S. at 368; see Schweiker v. Chilicky, supra, 487 U.S. at 423 ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies."). "[I]t is the overall comprehensiveness of the statutory scheme at issue, not the adequacy of the particular remedies afforded, that counsels judicial caution in implying Bivens actions." Dotson v. Griesa, supra, 398 F.3d at 166-67.

4. Declaratory Judgment Act

The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a).[18] An "actual controversy" exists when "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy [and] reality to warrant the issuance of a declaratory judgment." Golden v. Zwickler, 394 U.S. 103, 108 (1969) (internal quotation marks omitted). "'[A] mere demand for declaratory relief does not by itself establish a case or controversy necessary to confer subject matter jurisdiction.' [Rather,] [w]here 'the remedy sought is a mere declara-

[18]The Declaratory Judgment Act bars district courts from exercising jurisdiction over actual controversies "with respect to Federal taxes." 28 U.S.C. § 2201(a). "A controversy is with respect to federal taxes [i]f it call[s] into question a specific provision of the Internal Revenue Code or . . . a ruling or regulation issued under the Code." Jeda Capital-Lenox, LLC v. Commissioner of Internal Revenue Serv., No. 5:09-CV-0877 (GTS/DEP), 2011 WL 3516290 at *3 (N.D.N.Y. Aug. 11, 2011) (alterations in original; internal quotation marks omitted). Plaintiffs, however, do not challenge any specific provision of the Internal Revenue Code or any ruling or regulation issued under the Code.

tion of law without implications for practical enforcement upon the parties, the case is properly dismissed.'" Mitskovski v. Buffalo & Fort Erie Pub. Bridge Auth., 415 F. App'x 264, 267 (2d Cir. 2011) (summary order), quoting S. Jackson & Son, Inc. v. Coffee, Sugar & Cocoa Exch. Inc., 24 F.3d 427, 431 (2d Cir. 1994).

"[D]istrict courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites" because "facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp." Wilton v. Seven Falls Co., 515 U.S. 277, 282, 289 (1995); accord Jenkins v. United States, 386 F.3d 415, 417 (2d Cir. 2004).

C. Application of the Foregoing Principles

1. Fourteenth Amendment Claims

Plaintiffs allege that defendants are employed by the IRS (Compl. ¶¶ 7-11), which is, of course, a federal agency. Burch v. Pioneer Credit Recovery, Inc., 551 F.3d 122, 123 (2d

Cir. 2008) (per curiam). Because defendants are employed by the federal government and are not state actors, the Fourteenth Amendment is inapplicable to them and, therefore, plaintiffs' Fourteenth Amendment claims are dismissed.

2. Fifth Amendment Claims under Bivens

Plaintiffs' Fifth Amendment Bivens claims arise in a new context because they are substantially and meaningfully different from the three types of cases in which the Supreme Court recognized a Bivens remedy. As noted above, see Section III.B.3, supra, those cases involved a warrantless arrest and search that were allegedly executed without probable cause, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, supra, 403 U.S. at 389, a Fifth Amendment claim against a Congressman for firing his female secretary, Davis v. Passman, supra, 442 U.S. at 230, and an Eighth Amendment claim against prison officials for failure to treat an inmate's medical condition. Carlson v. Green, supra, 446 U.S. at 16 & n.1. This action, on the other hand, asserts claims arising out of a series of examinations and tax assessment activities by IRS employees conducted over a period of more than five years.

However, "Congress has designed a complex and comprehensive administrative scheme that provides various avenues of relief for aggrieved taxpayers. Indeed, [i]t would be difficult to conceive of a more comprehensive statutory scheme, or one that has received more intense scrutiny from Congress, than the Internal Revenue Code." Hudson Valley Black Press v. Internal Revenue Serv., supra, 409 F.3d at 113 (alteration in original; internal quotation marks omitted). For example, taxpayers may challenge an improper request for information by refusing to produce the information or records. Hudson Valley Black Press v. Internal Revenue Serv., supra, 409 F.3d at 111. If the taxpayer refuses to produce the materials requested, the IRS must issue a formal summons to the taxpayer and, if the taxpayer still refuses to produce the information sought, the IRS must institute an action in the district court to compel production of the material. Hudson Valley Black Press v. Internal Revenue Serv., supra, 409 F.3d at 111. Alternatively, a taxpayer can cooperate with the audit and then challenge any alleged tax deficiency either through an internal IRS appeal, a hearing before Appeals, a direct appeal to the Tax Court or a subsequent suit in district

court for a refund if the deficiency is paid. Hudson Valley Black Press v. Internal Revenue Serv., supra, 409 F.3d at 111.[19]

Additionally, "the Internal Revenue Code itself prohibits unnecessary examinations or investigations, and IRS agents are subject to discipline for violations of the Code." Hudson Valley Black Press v. Internal Revenue Serv., supra, 409 F.3d at 111-12 (citations omitted); see 26 U.S.C. § 7605(b) ("No taxpayer shall be subjected to unnecessary examination or investigations . . . ."); Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1203(b)(6), 112 Stat. 685, 721 (1998) (IRS employees must be fired for "violations of the Internal Revenue Code of 1986, Department of Treasury regulations, or policies of the Internal Revenue Service (including the Internal Revenue Manual) for the purpose of retaliating against, or harassing, a taxpayer"). Notably, plaintiffs have alleged conduct on the part of defendants which, if true, would require their dismissal.

[19]The complaint alleges that plaintiffs were denied access to Appeals (Compl. ¶¶ 168-85, 234-35, 238, 252, 256, 261, 278, 290-95, 301). However, even if this were true, and even if plaintiffs were not able to pay the deficiency and file suit in district court for a refund, they were still free to pursue an appeal to the Tax Court. Notably, Taylor availed himself of an appeal to the Tax Court (Compl. ¶¶ 159, 232).

Finally, in 26 U.S.C. § 7433(a), Congress authorized certain civil actions to redress alleged IRS employee misconduct arising out of the collection of taxes. Section 7433(a) provides:

> If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

The legislative history of Section 7433 "establishes that the failure of Congress to include a damages action for tax assessment activities was not inadvertent." Hudson Valley Black Press v. Internal Revenue Serv., supra, 409 F.3d at 112. Specifically, bills that would have authorized civil actions against individual IRS employees for constitutional violations committed in connection with tax assessment activities were never enacted. Hudson Valley Black Press v. Internal Revenue Serv., supra, 409 F.3d at 112. Additionally, Congress rejected a version of Section 7433 that would have authorized civil actions arising "in connection with any determination or collection of Federal tax." Hudson Valley Black Press v. Internal Revenue Serv., supra, 409 F.3d at 112 (emphasis in original; internal quotation marks

omitted). Thus, Congress had "expressly considered broader remedies -- including civil suits relating to tax assessment and for violations of any federal laws -- before rejecting them." Hudson Valley Black Press v. Internal Revenue Serv., supra, 409 F.3d at 112. This is a "sound reason[] to think Congress might [have] doubt[ed] the efficacy or necessity of a damages remedy," which is a reason to "refrain from creating the [Bivens] remedy in order to respect the role of Congress." Ziglar v. Abbasi, supra, 137 S. Ct. at 1858.

In light of this comprehensive remedial scheme and the legislative history of Section 7433, "every circuit that has considered the appropriateness of a Bivens remedy in the taxation context has uniformly declined to permit one." Hudson Valley Black Press v. Internal Revenue Serv., supra, 409 F.3d at 113; see Adams v. Johnson, 355 F.3d 1179, 1184-85 (9th Cir. 2004) ("[O]ur sister circuits that have addressed the question are nearly unanimous in holding that Bivens relief is not available for alleged constitutional violations by IRS officials involved in the process of assessing and collecting taxes"; collecting cases from the First, Third, Fifth, Sixth, Seventh, Eighth and Tenth Circuits); Judicial Watch, Inc. v. Rossotti, 317 F.3d 401, 412 (4th Cir. 2003). Indeed, with respect to the specific issue of tax assessment activities, several courts have held that a

Bivens remedy is not available for alleged Fifth Amendment violations by IRS employees in connection with such activities. See, e.g., Adams v. Johnson, supra, 355 F.3d at 1181, 1188 ("[P]laintiffs may not pursue a Bivens action [for Fifth Amendment substantive and procedural due process violations] with complaints about the IRS's audits, assessments, and collection of partnership taxes and the obligations of partners." (footnote omitted)); Perry v. Wright, 12 Civ. 721 (CM), 2013 WL 950921 at *8 (S.D.N.Y. Mar. 8, 2013) (McMahon, D.J.) ("[A] Bivens action is not available against IRS officials to challenge tax collection and assessment." (internal quotation marks omitted)); Petitio v. Hill, No. CV-04-4493 (SJF)(ARL), 2007 WL 1016890 at *10, *12 (E.D.N.Y. Mar. 26, 2007) (plaintiff "cannot assert viable [Fifth Amendment] claims against these [IRS] employees for any alleged violations of his constitutional rights as a result of their alleged tax assessment and collection related activities"), citing Hudson Valley Black Press v. Internal Revenue Serv., supra, 409 F.3d at 106; Roberts v. Internal Revenue Serv., 468 F. Supp. 2d 644, 651 (S.D.N.Y. 2006) (Marrero, D.J.) (plaintiff "cannot assert . . . viable claims against [IRS] employees for any alleged violations of his constitutional rights as a result of their tax assessment and collection related activities."

(footnote omitted)), aff'd, 297 F. App'x 63 (2d Cir. 2008) (summary order).[20]

Notwithstanding the foregoing array of authorities, plaintiffs nevertheless argue that a Bivens remedy should be available. They assert that their claims arise "from the alleged misconduct of the Defendants that clearly and directly had the effect of depriving Plaintiffs of their Fifth Amendment rights to due process and equal protection and seeks redress for harm suffered by Plaintiffs[] as a direct and proximate result of this specific type of alleged misconduct," not from enforcement of the

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[20]In Zherka v. Ryan, supra, 52 F. Supp. 3d at 575-76, 578-81, the Honorable Thomas P. Griesa, United States District Judge, recognized a Bivens action under the First and Fifth Amendments based on an IRS investigation of the plaintiff conducted in retaliation for his political activities. Zherka is distinguishable from the present case because plaintiffs have not alleged retaliation on the basis of any constitutionally protected activity. Additionally, Zherka has not been followed in cases arising out of similar facts. See, e.g., Buczek v. O'Carroll, No. 15-CV-273S, 2015 WL 5054184 at *5 (W.D.N.Y. Aug. 25, 2015) ("[I]mproper treatment by IRS employees is not, in light of the [Internal Revenue] Code's detailed and comprehensive remedial scheme, a sufficient basis upon which to extend a Bivens cause of action to [the plaintiffs [sic]] due process claims." (alterations in original; internal quotation marks omitted)); Scheuering v. United States, 14 Civ. 932 (NSR), 2014 WL 6865727 at *5 n.5 (S.D.N.Y. Dec. 4, 2014) (Román, D.J.) ("[A] tax-based grievance of th[e] sort [the plaintiff claimed] does not support a Bivens action."). Finally, Zherka was decided before Ziglar v. Abbasi, supra, 137 S. Ct. at 1857-58 (internal quotation marks omitted), in which the Supreme Court stated that an expansion of the Bivens remedy is "now a disfavored judicial activity" and suggested that the remedy should be limited to the search-and-seizure context.

tax code (Pl.'s Mem., at 21-22 (emphasis in original)). Plaintiffs also argue that no provision of the comprehensive remedial scheme established by Congress "is designed to compensate Plaintiffs for the damage that they have suffered as a direct and proximate result of Defendants' alleged violations of their fifth amendment rights to due process and equal protection" (Pl.'s Mem., at 22).

Plaintiffs' arguments are unavailing. Plaintiffs allege that defendants violated their constitutional rights through examinations, assessments against Taylor and denials of access to Appeals in order to protest the assessments. These alleged constitutional violations occurred in the course of tax assessment activities and are precisely the same types of activities that the Second Circuit has held do not give rise to a Bivens claim. Hudson Valley Black Press v. Internal Revenue Serv., supra, 409 F.3d at 107-08, 113 (rejecting First Amendment claim asserted for retaliatory audit, attempts to coerce plaintiff into signing fraudulent audit report and refusal to provide plaintiff with copies of seized tax records after he requested them to defend himself in an administrative hearing); see Judicial Watch, Inc. v. Rossotti, supra, 317 F.3d at 402-04, 413 (rejecting First and Fifth Amendment claims asserted for retaliatory audit); see also Colon v. Maddalone, 95 Civ. 0008 (JGK),

1996 WL 556924 at *6 (S.D.N.Y. Oct. 1, 1996) (Koeltl, D.J.) (declining to find Bivens claim where "[t]here [was] no question" that allegedly wrongful seizure and levies of property without notice "were pursuant to IRS tax collection activities").

Additionally, as noted above, see Section III.B.3, supra, "it is the overall comprehensiveness of the statutory scheme at issue, not the adequacy of the particular remedies afforded, that counsels judicial caution in implying Bivens actions." Dotson v. Griesa, supra, 398 F.3d at 166-67. Thus, whether any provision of Congress' comprehensive remedial scheme wholly compensates plaintiffs for the particular losses they incurred as a result of the defendants' alleged misconduct is not the proper inquiry.

Because of the comprehensive remedial scheme in place for plaintiffs' constitutionally-recognized interests, along with a clear indication that Congress did not intend to create a damages remedy for the conduct at issue, a new Bivens action should not be recognized to allow plaintiffs to sue defendants in their individual capacities for alleged Fifth Amendment violations. This is consistent with the Supreme Court's recent admonition that "expanding the Bivens remedy is now a disfavored judicial activity." Ziglar v. Abbasi, supra, 137 S. Ct. at 1857

(internal quotation marks omitted). Therefore, plaintiffs' Bivens claims are dismissed.

3. Declaratory Judgment

Although not briefed by the parties, because plaintiffs' action for damages has been dismissed, their action for a declaratory judgment that defendants violated their constitutional rights must also be dismissed for lack of subject matter jurisdiction.[21] As noted above, "[w]here 'the remedy sought is a mere declaration of law without implications for practical enforcement upon the parties, the case is properly dismissed.'" Mitskovski v. Buffalo & Fort Erie Pub. Bridge Auth., supra, 415 F. App'x at 267, quoting S. Jackson & Son, Inc. v. Coffee, Sugar & Cocoa Exch. Inc., supra, 24 F.3d at 431. Because plaintiffs' claims for damages have been dismissed, "a declaration favorable to [plaintiffs] would be just that and nothing more." S. Jackson & Son, Inc. v. Coffee, Sugar & Cocoa Exch. Inc., supra, 24 F.3d at 431.[22]

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[21]Federal courts have an independent obligation to ascertain their own jurisdiction. Local 377, RWDSU, UFCW v. 1864 Tenants Ass'n, 533 F.3d 98, 99 (2d Cir. 2008) (per curiam). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed.R.Civ.P. 12(h)(3).

[22]Because the action has been dismissed, I do not address (continued...)

IV. Conclusion

For the foregoing reasons, defendants' motion to dismiss the complaint is granted. The Clerk of the Court is respectfully requested to mark this matter closed.

Dated: New York, New York
July 21, 2017

SO ORDERED

HENRY PITMAN
United States Magistrate Judge

Copies sent to:

All Counsel of Record

[22](...continued)
defendants' remaining arguments.